

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JOHN C. DAVIS, as Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff in Error,

vs.

E. T. WILLEY,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and for  
the Northern District of California.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

### **Amended Complaint.**

Plaintiff complains of defendant, and for cause of  
action alleges:

#### I.

That on the 20th day of June, 1914, a petition  
was filed in the District Court of the United States  
in and for the Northern District of California, in  
bankruptcy, by Charles F. Willey, numbered 8788  
in the bankruptcy files of said court, which petition  
prayed that said Willey be adjudged bankrupt,  
and that thereafter on June 26th, 1914, said Charles  
F. Willey was by said court duly adjudicated a bank-  
rupt; that thereafter, on April 3, 1915, and at the  
first meeting of creditors called and held before  
Fred A. Copestake, Referee in Bankruptcy, to whom  
said matter in bankruptcy had been referred by said  
court, plaintiff above named was duly appointed  
Trustee in Bankruptcy of the estate of said bank-  
rupt, and thereafter plaintiff qualified as such  
trustee, and has ever since been and now is the  
duly appointed, qualified and acting Trustee in  
Bankruptcy of the estate of said bankrupt.

## II.

That in the months of January to May in the year 1912, said [1\*] Charles F. Willey was indebted to one Edward McGinn, and an action was then pending in the Superior Court of the State of California in and for the County of Mariposa for the recovery of said debt; that the trial of said action took place on or about February 8th, 1912, and the cause was then submitted to the court for decision that thereafter and pending the decision and judgment in said action, said Charles F. Willey, defendant in said action, transferred to his brother defendant herein, the said E. T. Willey, the sum of three thousand three hundred eighty-seven (\$3,387) dollars, or thereabouts, moneys of the said Charles F. Willey; that said transfer was made secretly and was made without consideration, and with the intent and for the purpose of defrauding the said Edward McGinn out of the moneys owing to him by the said Charles F. Willey, and for the purpose of preventing the enforcement and collection of any judgment which might be rendered in said action against said Charles F. Willey; that said transfer was made to said defendant E. T. Willey with the said intent and for the said purpose with the full knowledge and consent of said E. T. Willey. That at the time of the making of said transfer of said moneys said Charles F. Willey had no property other than that transferred, sufficient to pay the debts which he then owed to Edward McGinn, or any part thereof.

\*Page-number appearing at foot of page of original certified Transcript of Record.

## III.

That judgment was rendered in said action in favor of Edward McGinn on May 3, 1912, against said bankrupt; that said bankrupt appealed to the District Court of Appeal of the Third Appellate District of the state of California from the said judgment and said appeal was determined and the said judgment affirmed by the said District Court of Appeal on April 8th, 1914; that a petition was made by said bankrupt for a hearing of the same [2] matter by the Supreme Court of said State, and said petition was denied by said Supreme Court on June 6th, 1914, and the remittitur in said matter was made to the aforesaid Superior Court on June 8th, 1914, and that said bankrupt thereupon, on June 20th, 1914, filed his petition for voluntary bankruptcy, and named in the schedule accompanying said petition Edward McGinn as sole creditor and said judgment was the sole debt from which discharge was sought. That in the month of October, 1913, an execution was duly issued out of the said Superior Court upon the said judgment against the property of said Charles F. Willey, directed to the Sheriff of the County of Tuolumne, State of California, in which County said Charles F. Willey resided, which said execution was partially satisfied, and there still remains due and unpaid on said judgment over \$1,000.00, and at no time since the rendition of said judgment has there been sufficient money or property subject to levy by execution against the said Charles F. Willey out of which the balance due on said judgment, or any part

thereof, could be satisfied. That said Sheriff has not returned said execution into said court, and said Sheriff has informed plaintiff that said execution was lost and cannot be found.

#### IV.

That said creditor Edward McGinn at the time of said transfer or at any time prior to the commencement of said bankruptcy proceedings and the adjudication of said Charles F. Willey as bankrupt, had no knowledge or notice of the said transfer; that said transfer was at all times kept hidden and concealed from said Edward McGinn by said Charles F. Willey and E. T. Willey; that plaintiff herein at the first meeting of the creditors of said bankrupt on April 3, 1915, first received information that said bankrupt had transferred certain of his moneys to defendant; [3] that before plaintiff learned anything further as to the facts of said transfer, and on May 20th, 1915, the said bankrupt applied to the aforesaid District Court of the United States for a discharge in bankruptcy; that upon the hearing of said application and the objections of the creditor Edward McGinn thereto, said Court on June 19, 1915, referred the matter back to the Referee in Bankruptcy for hearing upon said objections; that said hearing was held before Fred A. Copestake, Referee in Bankruptcy, on February 2, 1916; that Charles F. Willey and E. T. Willey were examined before the referee at said hearing, and plaintiff learned from said examination the facts relative to the transfer of said moneys and the fraudulent nature of the same as hereinbefore alleged.



V.

That plaintiff, as such trustee, has insufficient assets with which to pay in full the debts of said bankrupt, or any part thereof, but on the contrary the assets of said estate will be insufficient to pay any part whatever of the debts of said bankrupt.

VI.

That plaintiff has demanded of defendant that he pay over to plaintiff the said sum of \$3,387.00, with interest thereon; that defendant refused and still refuses to pay over to him the said sum, or any part thereof.

WHEREFORE, plaintiff prays judgment against defendant for the sum of three thousand three hundred and eighty-seven (\$3,387.00) dollars with legal interest thereon from February 16th, 1912, with his costs.

J. C. WEBSTER,  
WILLIAM H. BRYAN,  
Attorneys for Plaintiff. [4]

State of California,  
County of Tuolumne.

John C. Davis, being duly sworn, says: That he is the plaintiff in the foregoing action; that he has read the complaint in said action, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes the said complaint to be true.

JOHN C. DAVIS.

Subscribed and sworn to before me, this 26th day of June, 1918.

[Seal]                      ERIC J. SEGERSTROM,  
Notary Public in and for the County of Tuolumne,  
State of California.

Receipt of a copy of the within Amended Complaint admitted this 29th day of July, 1918.

WILLIAM E. BILLINGS,  
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 30, 1918. Walter B. Mal-  
ling, Clerk. By Thomas J. Franklin, Deputy Clerk.  
[5]

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In the District Court of the United States in and  
for the Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Answer of Defendant.**

Comes now the above-named defendant and answering plaintiff's amended complaint on file herein, denies, alleges and admits as follows:

1. Answering paragraph II of said complaint, said defendant denies that in the months of January to May in the year 1912 or at any other time or at all that said Charles F. Willey was indebted to one

Edward McGinn; denies that thereafter or at all and pending the decision and judgment in the action mentioned in said paragraph, said Charles F. Willey, defendant in said action, transferred to his brother, defendant herein, the said E. T. Willey, the sum of three thousand three hundred eighty-seven dollars or thereabouts or any other sum, moneys of the said Charles F. Willey; denies that said transfer was made secretly and denies that said transfer was made at all or was made without consideration, and with the intent and for the purpose of defrauding the said Edward McGinn out of the moneys owing to him by the said Charles F. Willey, and for the purpose of preventing the enforcement and collection of any judgment which might be rendered in said action against said Charles F. Willey or anyone else; denies that said transfer was made to said defendant E. T. Willey with the said or any intent and for the said or any purpose with the full knowledge and consent of the said E. T. Willey. Denies that at the time of making the said transfer of said moneys said Charles F. Willey [6] had no property, other than that transferred, sufficient to pay the debts which he then owed to Edward McGinn or any part thereof and denies that he then or there or at all owed any debt or debts to the said Edward McGinn.

2. Answering paragraph III of said complaint, defendant denies that there still remains due and unpaid or due or unpaid on said judgment the one thousand dollars or any other sum except a very small amount; denies that at no time since the ren-

dition of said judgment has there been sufficient money or property subject to levy by execution against the said Charles F. Willey out of which the balance due on the said judgment or any part thereof could be satisfied. Said defendant has no knowledge, information or belief concerning the allegations made in lines 18 to 20 inclusive of said paragraph III on page 3 of said complaint and basing his denial upon said ground denies that said sheriff has not returned said execution into said court, and denies that said sheriff has informed plaintiff that said execution was lost and cannot be found.

3. Answering paragraph IV of said complaint said defendant denies that said creditor, Edward McGinn at the time of said transfer or at any other time prior to the commencement of the said bankruptcy proceedings and the adjudication of the said Charles F. Willey as bankrupt, had no knowledge or notice of the transfer; denies that the said transfer was at all times or at all kept hidden and concealed or hidden or concealed from said Edward McGinn by the said Charles F. Willey and E. T. Willey or either of them; denies that plaintiff herein at the first meeting of the creditors of said bankrupt, on April 3, 1915, first received information that said bankrupt had transferred certain of his moneys to defendant. And in this behalf defendant [7] alleges that the said plaintiff and the said Edward McGinn and each of them had possession of sufficient facts to have advised them of said transfer, if any there was, if they had been diligently pursued. Denies that said plaintiff learned from the examination

before the said referee in bankruptcy mentioned in said paragraph of said complaint, the or any facts relative to said or any transfer of the said moneys or the fraudulent nature thereof as hereinbefore or otherwise alleged and denies that said or any transfer was fraudulent.

4. Answering paragraph V of said complaint defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer the same and basing his denial on said ground denies that plaintiff as such trustee has insufficient assets with which to pay in full the debts of the said bankrupt or any part thereof.

As a further, distinct and separate defense to said complaint said defendant alleges: That said alleged cause of action purported to be stated in said complaint is barred by subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

WHEREFORE, said defendant prays that he be hence dismissed with his costs herein.

WILLIAM E. BILLINGS,  
Attorney for Defendant. [8]

State of California,  
County of Tuolumne,—ss.

E. T. Willey being first duly sworn deposes and says: That he is the defendant in the above-entitled action. That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

Subscribed and sworn to before me this 8th day of October, 1918.

[N. S.]

JAMES OPIE,

Notary Public in and for said County and State.

Receipt of copy of within answer is hereby admitted this 11th day of October, 1918.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

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In the District Court of the United States, in the Southern Division, Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Amendment to Amended Complaint.**

Plaintiff by leave of Court first obtained, files this amendment to his amended complaint, amending the same by striking therefrom the words beginning with "that" on page 3, line 18 and extending to the end of line 20, page 3, and by inserting after the word "satisfied," on line 13, page 3, the words, "and that said sheriff has duly returned

said execution into said court satisfied to the amount of Four Hundred Thirty-seven and 50/100 (\$437.50) Dollars only.”

State of California,

City and County of San Francisco,—ss.

J. C. Webster, being duly sworn on oath, says: That he is one of the attorneys in the above-entitled action; that he makes this affidavit for the plaintiff because said plaintiff is absent from the City and County of San Francisco; that he has read the foregoing amendment to the amended complaint and knows the contents thereof, and that it is true.

J. C. WEBSTER.

Subscribed and sworn to before me this 28th day of August, 1919.

[Seal]

C. M. TAYLOR,

Deputy Clerk U. S. District Court, Northern District of California. [10]

Received copy, Aug. 28, 1919.

WILLIAM E. BILLINGS,

Atty. for Deft. Willey.

[Endorsed]: Filed August 28, 1919. Walter B. Maling, Clerk. [11]

In the District Court of the United States in and  
for the Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Amendment to Answer.**

Comes now the defendant above named and by  
leave of the Court first had and obtained amends  
his answer as follows:

As a further, distinct and separate defense to  
said complaint said defendant alleges:

That the said alleged cause of action purported  
to be stated in said complaint is barred by the judg-  
ment heretofore rendered in an action tried in the  
above-entitled court in equity, in which John C.  
Davis, Trustee of the Estate of Charles F. Willey,  
in Bankruptcy, was plaintiff and E. T. Willey and  
Mrs. Charles F. Willey were defendants and re-  
specting the same alleged transfer that is the sub-  
ject of this action, said action being No. 341 in  
Equity.

WILLIAM E. BILLINGS,

Attorney for Plaintiff.

State of California,

City and County of San Francisco,—ss.

E. T. Willey being first duly sworn deposes and



says: That he is the defendant in the above-entitled action. That he has read the amendment to the said complaint above stated and that the same is true of his own knowledge except as to the matters therein stated on his information and belief and as to those matters he believes it to be true.

E. T. WILLEY.

Subscribed and sworn to before me this 28th day of August, 1919.

[Seal]

J. J. KERRIGAN,

Notary Public in and for said County and State. [12]

Receipt of copy of the within amendment is hereby admitted this 28th day of August, 1919.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed August 28, 1919. Walter B. Maling, Clerk. [13]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Opinion.**

J. C. WEBSTER and WILLIAM H. BRYAN, of  
San Francisco, for Plaintiff.

WILLIAM E. BILLINGS, of San Francisco, for  
Defendant.

VAN FLEET, District Judge:

This is an action at law by a trustee in bankruptcy to recover a certain fund alleged to have been transferred by the bankrupt to his brother in fraud of the rights of his creditors. It is admittedly prosecuted under the authority of Section 70-e of the Bankruptcy Act which provides that "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may [14] recover the property so transferred, or its value, from the person to whom it was transferred, etc."

It is well established that the effect of this section is to clothe the trustee with no new or additional right in the premises over that possessed by a creditor, but simply puts him in the shoes of the latter and subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf; and the rights of the parties are to be determined, not by any provision of the Bankruptcy Act, but by the applicable principles of the common law, or the laws of the State in which the right of action may arise. In other words, the Bankruptcy Act merely permits the trustee to assert the rights which the creditor could assert but for the pendency of the

bankruptcy proceedings, and if for any reason arising under the laws of the State the action could not be maintained by the creditor, the same disability will bar the trustee. Collier on Bankruptcy (10 Ed.) 1042, f. and g.; *In re Mullen*, 101 Fed. 413; *Holbrook v. First International Trust Co.*, 107 N. E. 665; *Manning v. Evans*, 156 Fed. 106.

The rights of the trustee being governed by these limitations, I am of opinion that the defense of the Statute of Limitations interposed by defendant must be sustained. That defense is based on section 338 of the Code of Civil Procedure of this State fixing the limitations of time within which actions must be commenced, subdivision four of which provides: "Within three years. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." It appeared in evidence at the trial that in [15] an action brought in the State court by the defendant here against the sheriff to recover property seized by the latter in satisfaction of a judgment theretofore recovered by McGinn, the creditor in whose right the present action is sought to be maintained, against C. F. Willey, the bankrupt, whose estate the trustee represents, and which was tried in March, 1914, it was disclosed by testimony given in the presence of McGinn and his counsel that pending that suit there had been a surreptitious, clandestine and presumptively fraudulent, transfer on the books of a local bank by the judgment debtor

to his brother, this defendant, of a part of the same fund here sought to be recovered. This disclosure was of a character and the circumstances such as to put any reasonable man upon inquiry at the time as to the fraud, and to clearly indicate that an investigation would then have exposed to McGinn and his attorney the entire transaction set forth in the complaint and involved in the present action. But no such investigation was made, for what reason it does not appear, and this action was not commenced until more than four years after the creditor was thus made aware of the facts stated,

No principle is better settled in actions based upon fraud and where the rights of a party are dependent upon his diligence in discovering the fraud, than that means of knowledge is knowledge itself; that knowledge of facts which should put a reasonable man upon inquiry invests the suitor in legal contemplation with full knowledge of all that such inquiry would have developed. *Wood v. Carpenter*, 101 U. S. 135; *Norris v. Haggin*, 28 Fed. 275; *Teall v. Schroder*, 158 U. S. [16] 172; *Archer v. Freeman*, 124 Cal. 528; *Bills v. Silver King Mining Co.*, 106 Cal. 9; *Truett v. Onderdank*, 120 Cal. 581; *Burke v. Maguire*, 154 Cal. 456.

The facts thus disclosed to the knowledge of the creditor more than four years before the bringing of this action clearly brings him, and the Trustee who represents him, within the terms of the Statute, as barring the maintenance of the action.

I have not overlooked the contentions of plaintiff as to the effect of Sec. 11-d of the Bankruptcy

Act, but it is sufficient to say without further discussion that I am wholly unable to sustain his view.

This conclusion as to the bar of the Statute renders it unnecessary to definitely consider the further defense of *res judicata*, although I am strongly inclined to the view that, if necessary, it would have to be sustained.

Judgment will go in favor of defendant dismissing the action and for costs.

[Endorsed]: Filed February 3d, 1920. Walter B. Maling, Clerk. [17]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

### **Stipulation for Findings.**

It is hereby stipulated that findings of fact may be made by the court upon trial and decision of the cause in the above-entitled action, and judgment entered thereon.

Dated February 5th, 1920.

J. C. WEBSTER and  
WILLIAM H. BRYAN,  
Attorneys for Plaintiff.  
WILLIAM E. BILLINGS;  
Attorney for Defendant.

Approved.

W. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Feb. 6, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,  
Defendant.

**Findings of Fact and Conclusions of Law.**

In this cause heretofore tried before the court,  
(a jury trial having been in writing waived by the  
parties), I find the following facts:

I.

That on June 26, 1914, Charles F. Willey was  
duly adjudicated a bankrupt by the District Court

of the United States, for the Northern District of California, and on April 3, 1915, John C. Davis, the plaintiff herein, was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter and prior to the commencement of this action, qualified as such trustee and has ever since been and now is, the duly appointed, qualified and acting trustee of the estate of Charles F. Willey, in bankruptcy;

## II.

That in January, 1912, prior to said adjudication in bankruptcy, said Charles F. Willey was indebted to Edward McGinn, and an action was pending in the Superior Court of the State of California in and for the County of Mariposa, [19] in which said McGinn was plaintiff, and said Charles F. Willey was defendant, for the recovery of said debt; that said action was tried on or about February 8, 1912, and submitted for decision and that pending the decision and judgment in said action, Charles F. Willey transferred to his brother, E. T. Willey, defendant herein, the sum of three thousand three hundred and eighty-seven (\$3,387) dollars, moneys of the said Charles F. Willey; that said transfer was made secretly, and without consideration, and with the intent and for the purpose of defrauding Edward McGinn out of the moneys owing to him by Charles F. Willey, and for the purpose of preventing the enforcement of any judgment which might be rendered in the aforesaid action against Charles F. Willey; that said transfer was made to E. T. Willey with said intent, for said purpose, with the

full knowledge and consent of E. T. Willey, and that at the time of making said transfer of said moneys, Charles F. Willey had no property other than that transferred, with which to pay the debt which he then owed said Edward McGinn, or any part thereof.

### III.

That judgment was rendered and entered on May 3, 1912, in said action, in favor of Edward McGinn, and against Charles F. Willey for the sum of \$———; that Charles F. Willey appealed from the said judgment to the District Court of Appeal, Third Appellate District of the State of California, where said judgment was affirmed on April 8, 1914; that thereafter Charles F. Willey, on June 20, 1914, filed his petition in the District Court of the United States for the Northern District of California, for voluntary bankruptcy, and named in the schedule accompanying said petition the [20] said Edward McGinn as a creditor, and the said judgment as a debt from which discharge was sought.

### IV.

That an execution was duly issued out of said Superior Court upon said judgment, against the property of Charles F. Willey, directed to the sheriff of the County of Tuolumne, State of California, in which county said Charles F. Willey resided, and said execution was partially satisfied; that there still remains due and unpaid on said judgment more than \$1,000.00 of the principal sum, besides interest.



## V.

That upon the issuance of said execution, the said sheriff levied the same upon certain property as the property of Charles F. Willey, and seized and sold the same in partial satisfaction of said judgment; that thereafter E. T. Willey brought an action against the said sheriff, in the Superior Court for the County of Tuolumne, for the conversion of the property so seized by the said sheriff, and recovered judgment therein against the said sheriff for the value of the said property; that said action was tried in the month of March, 1914; that one J. C. Webster was counsel for the said sheriff in the trial of said action, and at the trial thereof testimony was given in the presence of said Webster and said McGinn by an officer of the First National Bank at Sonora to the effect that a transfer had been made upon the books of the bank by Charles F. Willey to E. T. Willey of certain moneys; that it appears from the evidence in this case that the said moneys so transferred were a part of the moneys transferred by Charles F. Willey to E. T. Willey, as hereinbefore found; that the disclosure of the said transfer at the said [21] trial was such as to put the said McGinn and this plaintiff upon inquiry as to the fraud in the said transfer, and to show that an investigation would then have exposed to Edward McGinn and J. C. Webster the entire transaction set forth in the complaint in the present action; that no such investigation was made prior to the month of April, 1915.

## VI.

That heretofore this plaintiff commenced a suit in equity in the District Court of the United States, for the Northern District of California, against said E. T. Willey and Mrs. Charles F. Willey, wife of the said bankrupt; said suit being numbered 341 in equity, for the purpose of obtaining a decree requiring E. T. Willey and Mrs. Charles F. Willey to pay over to the plaintiff the same moneys sought to be recovered in this action, and setting up in the complaint in said suit the same fraudulent transfer by Charles F. Willey as is alleged in the complaint in this action; that said cause was thereafter tried in this court, and it was decreed by the Court that the defendant Mrs. Charles F. Willey had received certain of said moneys as a fraudulent transferee of Charles F. Willey, and that she pay over the same to plaintiff; that as to the defendant E. T. Willey the said suit was ordered dismissed and a decree duly entered to that effect; that no appeal was taken by the plaintiff in said action to the Circuit Court of Appeals, or other proceeding taken to review said order or decree dismissing the said suit as to E. T. Willey.

## CONCLUSIONS OF LAW.

I conclude as a matter of law from the foregoing facts, that the present action is barred by the provisions of subdivision 4, of section 338 of the Code of Civil Procedure [22] of the State of California; and further that the action is barred by the order or decree dismissing as to defendant,

E. T. Willey the said suit numbered 341, in equity, in this court.

Dated February 20th, 1920.

WM. C. VAN FLEET,  
U. S. District Judge.

Received copy of within proposed findings and conclusions of law.

WILLIAM E. BILLINGS,  
Atty. for Deft.

[Endorsed]: Filed Feb. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

### **Judgment on Findings.**

This cause having come on regularly for trial on the 28th day of August, 1919, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein, William H. Bryan and J. C. Webster, Esqrs., appearing as attorneys for plaintiff, and William E. Billings,

Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 29th day of August, 1919, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration and decision; and the Court after due deliberation, having filed its opinion and findings and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at \$——.

Judgment entered February 20, 1920.

WALTER B. MALING,

Clerk. [24]

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**(Certificate to Judgment-roll.)**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 20th day of February, 1920.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

[Endorsed]: Filed February 20, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Notice of Decision.**

To JOHN C. DAVIS, Plaintiff Above Named, and to J. C. WEBSTER and WILLIAM H. BRYAN, Attorneys for Plaintiff:

You and each of you will please take notice that judgment in the above-entitled case was rendered in favor of the defendant above named on the twentieth day of February, 1920.

Dated March 12, 1920.

WILLIAM E. BILLINGS,

Attorney for Defendant.

Receipt of copy of the within notice is hereby admitted this 12th day of March, 1920.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 5, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Bill of Exceptions, etc.**

BE IT REMEMBERED, that on the 27th day of August, 1919, at a stated term of the District Court of the United States in and for the Southern Division of the Northern District of California, the above-entitled case came on regularly for trial, before the Honorable WM. C. VAN FLEET, District Judge presiding, the court sitting without a jury, a jury having been duly waived in writing by the parties, and said written waiver filed with the clerk of said court; plaintiff being represented by William H. Bryan and J. C. Webster, and defendant being represented by William E. Billings, and the following proceedings had:

Mr. McGinn, called as a witness on behalf of plaintiff, was duly sworn, and testified as follows: "I am a creditor of Charles F. Willey, a bankrupt. In the year 1911, I claimed a one-sixth interest in the Treasure Gold Mine, in Mariposa County. The mine stood in the name of Charles F. Willey. Charles F. Willey had made a sale of the mine

and payments on account had been made to him in 1911. I demanded of Charles F. Willey that he pay over to me the moneys owing to me for my one-sixth interest. He refused [27] to pay it over, and denied my ownership. I then got an attorney and commenced suit against him in Mariposa County to recover the moneys already paid to him and to determine my ownership. I obtained a judgment against Charles F. Willey, which was entered in May, 1912, for \$1,040.00, moneys paid by the purchaser of the mine to Charles F. Willey up to the time of the trial, for my one-sixth share and adjudging that I was the owner of a one-sixth interest in the mine.”

It was here stipulated as follows:

The action above referred to—Edward McGinn vs. Charles F. Willey, was filed December 9, 1911; the trial had on February 8, 1912, in the Superior Court of Mariposa County, California; judgment was entered on May 3, 1912; a notice of intention to move for new trial filed May 22, 1912, which motion was denied on May 28, 1912. An execution was issued on the judgment and levied on an automobile as the property of Charles F. Willey, in 1913, by William Sweeney, sheriff of Tuolumne County, California; that said sheriff sold the automobile and the proceeds of same were \$437.50, which was applied upon the judgment. E. T. Willey, defendant herein, claiming the automobile as his own, sued the sheriff for conversion in the action, Willey vs. Sweeney, Superior Court, Tuolumne County, California, and that action was tried

on March 14, 1914, and resulted in a verdict against the sheriff. A motion for new trial was made and subsequently granted by the Court and the action was not further prosecuted.

Mr. McGinn, continuing: "At a meeting of the creditors of Charles F. Willey, in April, 1915, at which a trustee was elected, was the first time I ascertained any facts with reference to the transfer by Charles F. Willey of any money to his brother. I learned then that he had turned some money over [28] to his brother, and that his brother claimed the money. I was present at the trial in the action of E. T. Willey against Sweeney."

There was then offered and received in evidence all the records in the bankruptcy proceeding, No. 8788, in the matter of Charles F. Willey, bankrupt, In the United States District Court, Northern District of California.

It was stipulated that the substance of the records in the bankruptcy proceeding pertinent to this case were as follows:

Petition filed June 20, 1914;

Ordered Charles F. Willey adjudged bankrupt June 26, 1914;

First meeting of the creditors held at Sonora, California, April 13, 1915, and John C. Davis appointed trustee, and duly qualified as trustee on April 7, 1915. Edward McGinn filed on April 3, 1915, his claim based upon his judgment against the bankrupt, in due form. The substance of his claim is as follows:

Judgment for \$1,040.27, on which \$437.50 was



credited, and that subsequent to the trial of the action resulting in said judgment, and prior to the entry of the judgment, there was paid to Charles F. Willey, on account of the one-sixth interest in the Treasure Mine adjudged to be the property of Edward McGinn, the further sum of \$457.73, which was subject to the judgment and which was retained by the bankrupt.

Bankrupt's petition for discharge filed May 20, 1915;

Objections of Edward McGinn thereto filed June 18, 1915;

Said objections referred to referee for hearing on June 19, 1915;

Hearing on said objections had before Referee Feb. 2, 1916;

Report of Referee on said objections and application for discharge returned May 16, 1917.

Petition for discharge denied May 22, 1917. [29]

### **Testimony of W. E. Burden, for Plaintiff.**

W. E. BURDEN, called as a witness for the plaintiff, was duly sworn, and testified as follows:

“In the year 1912, I was Assistant Cashier of the First National Bank of Sonora, California. Charles F. Willey, at the time had an account in our bank. I am familiar from the records of the bank with any and all transactions in regard to his account. On February 27, 1912, C. F. Willey closed a savings account in which he had \$840.38 and we accounted for two collections we had for his account, one from the Stockton Savings and Loan Society for

(Testimony of W. E. Burden.)

\$1252.02, and one from the Hibernia Savings & Loan Society for \$1,294.97, a total of \$3,387.37; and at that time we issued a certificate of deposit in the name of C. A. Belli, cashier of the bank. E. T. Willey had a personal account at the bank during February, 1912. The next transaction with reference to the account established by C. F. Willey in the name of C. A. Belli, Cashier, was on March 13, 1912, when the certificate for \$3,387.37 was cancelled and a new certificate in the same form for \$100 less, was issued to C. A. Belli, Cashier. The \$100 difference was a cash transaction. The next transaction appears on May 28, 1912, when the certificate for \$3,287.37 was cancelled and a savings account was opened in the name of E. T. Willey with \$1,500 deposit, and also a commercial account in the name of E. T. Willey 'special' for \$1,787.37."

The witness then identified and there was offered and received in evidence and read into the record two certificates of deposit in substance as follows:

Certificate of Deposit No. 3159, dated February 26, 1912, to E. T. Willey, deposited in this bank \$3,387.37, payable to C. A. Belli, signed by the assistant cashier.

Certificate of deposit No. 3191, dated March 13, 1912, E. T. Willey has deposited in this bank \$3,287.37, payable to C. A. Belli. [30]

The witness continuing: "The Savings account was paid out about a year and a half following. I could not find the exact date, but I found a memorandum of the check of withdrawal, which showed

(Testimony of W. E. Burden.)

that \$1,565.07 was withdrawn on October 25, 1913. The amount above \$1500 was accumulated interest. That closed the savings account.”

**Testimony of J. H. Knowles, for Plaintiff.**

J. H. KNOWLES, called as a witness for the plaintiff, was duly sworn, and testified as follows:

“In the year 1912, I was assistant cashier of the First National Bank of Sonora. The certificates of deposit heretofore referred to in the testimony of Mr. Burden are in my own handwriting. The transaction involving the deposits referred to in these certificates was handled by me and by C. F. Willey, Mr. C. F. Willey came into the bank and as I had known the family for a good many years he naturally came to me to wait on him, and he brought in various accounts and wished to deposit them to his account—two savings account banks, one from Stockton and one from San Francisco, and wanted them all put into one account. He motioned for me to come and wait on him and said that he wanted to put them into an account that could not be attached—in a shape that they could not be attached. I do not recall that C. F. Willey said anything about any litigation pending against him. He just simply said he wanted these funds put in shape so that they could not be attached. I would say from this certificate of deposit that that conversation took place on February 26, 1912. We often have requests coming to us to put moneys in shape

(Testimony of J. H. Knowles.)

so they cannot be attached, and we have this way of doing it. A certificate of deposit is not payable without the certificate itself being presented, but is payable only to the individual who is named in the certificate, or his endorsee, and so it could not be garnished without this certificate of deposit. The method of doing it was [31] at the suggestion of the bank. The second certificate was also made in the same manner. The bank's record shows that C. F. Willey cashed that certificate of deposit and put \$1787.37 in a special account, E. T. Willey's account. I believe E. T. Willey had another account in the bank, and to keep this separate I believe we called one a 'special' account that it might not be confused with the other."

On cross-examination, Mr. Knowles testified:

"I talked to Mr. McGinn, or his attorney, about these accounts after the whole thing was over, but not at the time of the suit concerning the levy on the automobile. At some time during the last five years I have talked with both sides about these accounts, but I could not fix dates."

On redirect examination, Mr Knowles testified:

"I recall being called before the referee in bankruptcy at a hearing in Sonora, California, in April, 1915. I testified in regard to these transactions at the hearing before the referee. I do not recall having talked with the attorneys of the parties at any time before that."

**Testimony of E. T. Willey, for Plaintiff.**

E. T. WILLEY, called as a witness for the plaintiff, was duly sworn, and testified as follows:

“I am the defendant in this action, and I am a brother of Charles F. Willey, the bankrupt named here. In February, 1912, I had an account in the First National Bank of Sonora, and I had a savings account there in June, 1912. I had a special account and a \$1500 savings account in May and June, 1912. The \$1500 account was not my money, but it was standing in my name. I am the E. T. Willey to whom the various accounts as was testified were transferred. I believe the amount of those was \$3,287.37. At the time they were transferred to me I do not think [32] I gave my brother any consideration for them. I knew he was then engaged in litigation with Edward McGinn, and that the action for the mining claim had been tried before the court at the time the transfer was made to me. I think the judgment was rendered after the account was actually transferred to me; I don't remember.”

**Testimony of J. C. Webster, for Plaintiff.**

J. C. WEBSTER, called as a witness on behalf of the plaintiff, was duly sworn, and testified as follows:

“I am one of the attorneys for John C. Davis, trustee in bankruptcy of Charles F. Willey, and also attorney for the creditors. I was attorney for Mr. McGinn in the suit of McGinn v. Willey, and

(Testimony of J. C. Webster.)

caused execution to issue against the property of Charles F. Willey. I made diligent search for property of Charles F. Willey. No money or property has come into the hands of the trustee in bankruptcy, except a little vacant lot which has a nominal value not to exceed \$20.00.”

On cross-examination, Mr. Webster testified:

“I took no supplemental proceedings against Willey to recover the property after the money realized from the sale of the automobile had been applied on the judgment in McGinn v. Willey because Willey had filed his petition in bankruptcy, which tied the hands of the State court.”

**Testimony of W. E. Burden, for Defendant.**

W. E. BURDEN, called as a witness for the defendant, testified as follows:

“I was a witness at the trial of Willey v. Sweeney, the sheriff, but I have no independent recollection of what occurred at that time.”

The transcript of the testimony taken at the trial of Willey v. Sweeney, sheriff, was offered and received in evidence and marked Defendant’s Exhibit “A.” [33]

Mr. Billings read therefrom a portion of the testimony of W. E. Burden, as follows:

Mr. WEBSTER.—“Q. Have you any record of the First National Bank of Sonora of an account which was in the First National Bank of Sonora in the year 1912, under the name of E. T. Willey, special? A. Yes, I have. Q. I would like, if you would refer to your record

(Testimony of W. E. Burden.)

and testify, if you can, when that account was created, and when and in what manner that was closed, if at all? A. The account of E. T. Willey, special, was created, May 28th, 1912, and closed by one check in June, 1912, and another in September, 1912.

Mr. WEBSTER.—What was the amount of the special account at the time it was created? A. \$1787.37. Q. Now have you any record of how that special account was created? A. Why, by a transfer—

Mr. HAMPTON.—We object to that as immaterial, irrelevant and incompetent for any purpose in this case.

The COURT.—If it has any bearing on this transaction they are entitled to it. It might go more to its weight than to its admissibility. Answer it. A. It was created by a certificate of deposit in the name of C. A. Belli.

Mr. WEBSTER.—Have you the record as to what that certificate of deposit was given for? A. It was a transfer of funds from the account of C. F. Willey.

Mr. WEBSTER.—Transfer of funds from the account of C. F. Willey, and when was that transfer made? A. Why, in February, 1912.”

[34]

**Testimony of E. T. Willey, for Defendant.**

E. T. WILLEY, called as a witness for defendant, testified as follows:

“I was not present when the transfers of money

(Testimony of E. T. Willey.)

were made from the account of Belli to myself in the First National Bank of Sonora. I knew nothing about them. I was told afterwards by Mrs. C. F. Willey that the special account of \$1787 had been transferred to me; that transfer was made to me because \$1090 of that amount I had loaned to my brother, C. F. Willey, at different times. The other \$700 was fire insurance belonging to my mother. I drew a check for about \$800 on this money to buy an automobile. It was the automobile that was the subject of my suit against the sheriff. The rest of the money I left in the care of Mrs. C. F. Willey for my mother. I knew nothing about the \$1500 savings account until some time afterwards. It was transferred to my name without my knowledge of consent. I gave the \$1500 to Mrs. C. F. Willey; I don't know what became of it after it left my hands. Mrs. Willey asked me to get it for her. I didn't know about it before that time. She just said she wanted the money and would like me to draw it up there, and she told me then about its being there. I was present at the trial of Willey v. Sweeney, sheriff. Mr. McGinn was present during that trial. I heard the testimony of Mr. Burden at that trial. Mr. McGinn was there at that time."

On cross-examination, E. T. Willey testified:

"At the time of the transfer I knew nothing about the transfer of these moneys from my brother's account to me. I do not remember just when I learned they had been transferred to my



(Testimony of E. T. Willey.)

account. I knew it prior to the time that I turned these moneys over to my brother's wife, and prior to the purchase of the automobile. When I learned that there had been \$1787 deposited in my name in a special account, I think it was explained to me by Charles F. Willey how that money came to me, but I do not think [35] the \$1500 savings account was mentioned. I learned about the savings account, I think, from Mrs. C. F. Willey. They told me why this special account was placed in my name. I don't remember that I testified at the trial of Willey v. Sweeney, sheriff, that the moneys that made up this \$1787 special account were moneys that I had earned, and were not moneys that had been transferred from my brother's account to my account in the bank."

Mr. Webster here showed the witness transcript of his testimony taken at the trial of Willey v. Sweeney:

Q. "Mr. Willey, by refreshing your memory, did you so testify in that case?"

"A. I guess I must have."

The COURT.—"Now what was that testimony?"

Mr. WEBSTER.—"The testimony is as follows: (Reading.)

"Q. And you stated you paid for it with the check introduced in evidence in this case? A. Yes, sir. That is the check that purchased the automobile.

Q. Now you have drawn this check; under your name is marked—written, ‘special account,’ against which this check was drawn.  
A. That is money I had in the bank to pay for this machine.

“Q. You put that money in the bank for the purpose of purchasing this machine, did you?  
A. Yes, sir.

“Q. You stated, Mr. Willey, that this check was drawn on the special account? A. Yes, sir.

“Q. That was placed with the bank for the purpose of buying this automobile? A. And for the benefit of my mother in case anything happened to me; there was more than enough to pay for the price of the machine.

“Q. And when was that money placed in the bank? A. I don’t remember just when I did put it there. [36]

“Q. Shortly before the machine was purchased and the check drawn? A. Some little time before, I think.

“Q. Well, have you any more definite knowledge? A. I could not give the date, no.

“Q. To refresh your memory, was it along the latter part of 1911? A. It might have been in 1911, some time; I could not say.

“Q. And where did you get this money that was deposited in the bank to that special account? A. It was money I had saved up from working.

“Q. And had you had it on deposit in some other account prior to that time? A. I had another small account, in a commercial account.

“Q. Did you draw out of this account and put it in the special account? A. No.

“Q. Then this was money you deposited at this time, not drawn out of any other account? A. No, sir.

“Q. Where did you have the money before you put it in the bank? A. I had it at home.

“Q. At home? A. Yes, sir.

“Q. Where? A. At Stent.

“Q. In Stent? A. Yes, sir.

“Q. And how much? A. Well, I can't give you the exact amount.

“Q. Now, as a matter of fact, Mr. Willey, was not this money that was deposited in the special account, money that was delivered to you, given to you or transferred to you in some way by your brother, C. F. Willey? A. No, sir.

“Q. You had no money of your own—had you any money of your own when you returned to Tuolumne County, from Nevada? A. Did I have any? [37]

“Q. Yes. A. I had.

“Q. How much money did you have at that time? A. I don't recollect what I did have.”

Q. That was your testimony given at that time, was it, Mr. Willey? A. Yes.

E. T. WILLEY resumes: “This special account

(Testimony of E. T. Willey.)

referred to in the testimony given in the case of Willey vs. Sweeney is the same special account on which the check for the automobile was drawn. It was the only special account in my name of moneys transferred from my brother's account. There was a consideration for that transfer. I had loaned my brother \$1,090.00. I think it was during the year 1910. I supposed my brother had some money. I did not know where he had it on deposit. I don't remember the dates on which I loaned him the money."

The COURT.—“What was the purpose of the loan?

A. I don't know what he wanted to use it for.

Q. Did he give you a note?

A. No, I did not ask for any.

Q. How did you pay him the money, by check?

A. No, I gave him cash.

Q. Where did you have the \$1,090 in cash?

A. I gave it to him at different times.

Q. Where did you have that amount of money in 1910 in cash?

A. I had some at my home and some of it with me.

Q. Some at home and some with you is a very indefinite statement. A man does not carry around \$300 or \$400 or \$500 in his breeches pocket, or a thousand dollars. Can't you tell us more definitely than that?

A. I never put much money in the bank. I always kept it in the house.

(Testimony of E. T. Willey.)

Mr. WEBSTER.—Q. Now, was your brother paying interest on this loan?     A. No. [38]

Q. Was there any note or memorandum of any kind in his handwriting in reference to this loan that you speak of?     A. No.

Q. No promissory note to repay it?     A. No.

Q. No receipt of any kind passed between you?

A. I don't think that he told me what he wanted it for. He may have at the time. If he did I have forgotten.

Q. Were you in the habit of loaning money so frequently that you did not pay any attention to what the circumstances were under which you loaned it?

A. Well, I never asked him any questions."

Witness resumes, responding to Mr. Webster's questions:

"My brother paid over to me the \$700 which was to go to my mother on insurance money at the same time he paid me the balance. The money was left with Mrs. Charles Willey to give to my mother. She gave it to my mother as she needed it to help in her support and maintenance. My mother lived alone in a house a short distance from Charles F. Willey's house in Stent. I was living at Black Oak fifteen or twenty miles away at the time. I don't know how much of this money Charles F. Willey has spent towards the maintenane of my mother. He says it is all gone.

The COURT.—Do you know anything about it? Have you handled any of it?

A. I have not handled it.

(Testimony of E. T. Willey.)

Q. You do not know whether they have ever paid a dollar over to your mother?

A. She told me that they did.

Mr. WEBSTER.—Q. This loan of \$1,090 you testified to was not made in one loan? A. No.

Q. How many different loans went to make up this \$1,090? A. Three, I believe.

Q. When was the first loan made, about?

A. About 1910.

Q. What was the amount of it?

A. I think about \$400. [39]

Q. When was the second made?

A. I don't remember the date of any of these.

Q. What was the amount of the second loan?

A. \$350; it was either \$350 or \$340; I don't remember which.

Q. You don't remember exactly what it was?

A. No.

Q. When was the third loan?

A. There may have been one loan I made early in 1911; I am not sure about that.

The COURT.—What were you doing at that time?

A. I think I was working at the Black Oak Mine.

Q. In what capacity? A. Blacksmith.

Q. What were your earnings? A. \$4 a day.

Q. How long had you been earning that?

A. I don't remember; I worked there eight years altogether.

Q. How long since had you been back from Nevada?

(Testimony of E. T. Willey.)

A. I think it was 1907 when I came back from Nevada.

Q. You had carried this amount of money around in your pocket, or kept it at the house, this money that you loaned your mother?

A. I kept most of it at my home.

Q. Where did you live?      A. Stent.

Q. Alone?

A. With my mother when I was at home.

Q. You lived with your mother when you were at home?      A. Yes.

Q. Did you say nothing to your brother as to the purpose for which he wanted this money when he said he wanted it as a loan?

A. I think there was something said, but I don't remember what it was.

Q. You were not a financier who was able to make so many loans that you did not pay attention to what the circumstances for a particular loan were?

A. He must have told me, but I don't remember.

Q. Don't you remember?

A. I don't remember what it was now. [40]

Q. You see, I am asking these questions—of course, I have got to pass on this evidence; the truth of the statements must be tested by the usual and ordinary methods that men pursue in their dealings with one another. It is a perfectly legitimate ground for disbelieving a man if his testimony involves a state of circumstances which do not accord with the way men usually do things. That is why I am asking you.

(Testimony of E. T. Willey.)

A. I think he told me at the time what he wanted it for, but I am not sure.

Q. You knew at the time that your brother was a man of some means and had some money in the bank, did you not?

A. I knew he had some money.

Q. Why didn't you say to him, Why don't you take some of your savings money and do whatever it is that you want to do with this money? Didn't it strike you as rather a singular thing that your brother, with a savings account or two, where he was getting interest on his money, would come to you and ask you to loan him money without offering to give you any note or stipulation to pay you any interest? Do you think that that looks reasonable?

A. I know it does not. I did not ask him for interest."

There was here offered and received in evidence on behalf of the defendant, the record in action Number 341, in Equity, entitled John C. Davis, trustee, vs. E. T. Willey et al., in the District Court of the United States, Southern Division of Northern District of California, and marked Defendant's Exhibit "B."

Thereupon the action was submitted to said court for decision, and thereafter, on the 20th day of February, 1920, the court found in favor of defendant, and made and filed its Findings of Fact and Decision herein.

Defendant specifies the following particular in which the evidence is insufficient to support the Find-



ings, Decision and [41] judgment of the court, viz.:

The evidence is insufficient to support Finding V to the effect that such disclosure was made at the trial of the action of E. T. Willey against Sweeney, the sheriff, in March, 1914, of any transfer of any moneys by Charles F. Willey to E. T. Willey, such as to put the said McGinn and this plaintiff upon inquiry as to the fraud in the said transfer and to show that investigation would then have exposed to Edward McGinn and J. C. Webster the entire transaction in the complaint set forth in the present action.

The evidence is insufficient to support Finding VI to the effect that the judgment or decree dismissing as to defendant, E. T. Willey, the suit in Equity in the District Court of the United States, for the Northern District of California, against E. T. Willey and Mrs. Charles F. Willey, Number 341, constituted a bar to the present action.

The evidence and findings are insufficient to support the Conclusion of Law that the present action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and that the present action is barred by the order or decree dismissing as to defendant, E. T. Willey, the said suit numbered 341 In Equity, in this court.

That since the said decision and judgment in favor of defendant, as aforesaid, said District Court, from time to time, by orders duly made, has granted to said plaintiff extensions of time to and including August 15, 1920, in which to prepare, serve and file

his bill of exceptions to be used upon any writ of error hereafter to be allowed; the said orders being signed by said court and filed herein in the office of the clerk of said court.

The foregoing constitutes all of the proceedings had, and all testimony offered and received on the trial of said cause [42] and now within the time required by law and the rules of this court, said plaintiff, John C. Davis, trustee of the estate of Charles F. Willey, in bankruptcy, proposes the foregoing as and for the Engrossed Bill of Exceptions as aforesaid, and prays that the same may be settled and allowed as correct.

J. C. WEBSTER,  
WILLIAM H. BRYAN,  
Attorneys for Plaintiff. [43]

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### **Stipulation Re Bill of Exceptions.**

It is hereby stipulated that the foregoing Bill of Exceptions is correct; that it contains all of the testimony offered and received and all the proceedings had on the trial of said cause.

Dated August 2d, 1920.

J. C. WEBSTER,  
WILLIAM H. BRYAN,  
Attorneys for Plaintiff.  
WILLIAM E. BILLINGS,  
Attorney for Defendant.

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### **Order Certifying and Allowing Bill of Exceptions.**

The foregoing Bill of Exceptions now being

presented in due time and found to be correct, I do hereby certify that said bill contains all of the testimony offered and received, and all of the proceedings had on the trial of said cause.

Dated August 5th, 1920.

WM. C. VAN FLEET,  
Judge of the United States District Court, for the  
Northern District of California, Second Division.

Service of the within proposed Bill of Exceptions and Engrossed Bill of Exceptions, and receipt of a copy is hereby admitted this 31st day of July, 1920.

WILLIAM E. BILLINGS,  
Attorney for Defendant. [44]

[Endorsed]: Filed Aug. 5, 1920. W. B. Maling,  
Clerk. By. J. A. Schaertzer, Deputy Clerk. [45]

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**Defendant's Exhibit "B."**

In the District Court of the United States, in and for  
the Northern District of California.

IN EQUITY.—No. 341.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY and MRS. CHARLES F. WILLEY,  
Defendants.

## COMPLAINT TO SET ASIDE TRANSFER.

To the Judges of the District Court of the United States, in and for the Northern District of California:

John C. Davis, a citizen of the State of California, residing in Tuolumne County in said State, Trustee of the Estate of Charles F. Willey in Bankruptcy, brings this, his bill, against E. T. Willey and Mrs. Charles F. Willey, citizens of the State of California and residing in Tuolumne County in said State. And therefore plaintiff complains and says:

## I.

That on the 20th day of June, 1914, a petition was filed in the District Court of the United States in and for the Northern District of California, in bankruptcy, by Charles F. Willey, numbered 8788 in the bankruptcy files of said court, which petition prayed that said Willey be adjudged bankrupt, and thereafter on June 26th, 1914, said Charles F. Willey was by said court duly adjudicated a bankrupt.

That thereafter, on April 3, 1915, and at the first meeting of creditors called and held before Fred A. Copestake, Referee in Bankruptcy, to whom said matter in bankruptcy had been referred by said court, plaintiff above named was duly appointed Trustee in Bankruptcy of the Estate of said Bankrupt, and [46] thereafter plaintiff qualified as such trustee, and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of the Estate of said Bankrupt.

## II.

That Edward McGinn is the sole creditor of said

bankrupt; that the claim of said creditor consists of a judgment of the Superior Court of the State of California, in and for the County of Mariposa in favor of said Edward McGinn and against said bankrupt, rendered by said court on or about May 3, 1912, for the sum of \$1,040.27 and costs. That proof of the said claim was duly made in the said bankruptcy proceeding, and a certified copy of the said judgment filed therewith.

That at all times from July 1st, 1907, until the aforesaid judgment was given and made, Edward McGinn was the equitable owner of a one-sixth interest in a mining property in Mariposa County, California, the legal title to which said interest was held by said bankrupt, Charles F. Willey, in trust for Edward McGinn. That in the year, 1909, the said bankrupt entered into a contract for the sale of said property so held in trust, and by virtue of said contract and prior to the commencement of the action which resulted in the aforesaid judgment, said bankrupt received certain moneys on account of the purchase price of the said property, but failed and refused to account to the said Edward McGinn for the said moneys and to pay over the same to him; and that thereafter, on September 30th, 1911, the said Edward McGinn brought the said action against the said bankrupt in the aforesaid Superior Court to recover the said moneys; that said bankrupt after receiving the aforesaid moneys on the purchase price of the said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to defendants above named all the moneys received as afore-

said from the sale of the said interest of Edward [47] McGinn together with other moneys of said bankrupt amounting altogether to the sum of \$3,-300.00, or thereabouts, so transferred. That said transfer was made without consideration and with the intent and for the purpose of defrauding said Edward McGinn out of the moneys due him as aforesaid. That said transfer was made to said defendants with said intent and for said purpose with the full knowledge of said defendants and each of them and with their consent and the consent of each of them.

### III.

That said bankrupt appealed to the District Court of Appeal of the Third Appellate District of the State of California from the said judgment rendered May 3d, 1912, and said appeal was determined and the said judgment affirmed by the said District Court of Appeal on April 8th, 1914; and a petition by said bankrupt for a hearing of the same matter by the Supreme Court of said State was denied by said Supreme Court on June 6th, 1914, and the remittitur in said matter was made to the aforesaid Superior Court on June 8th, 1914, and that said bankrupt thereupon, on June 20th, 1914, filed his petition for voluntary bankruptcy, and named in the schedule accompanying said petition Edward McGinn as sole creditor and said judgment as the sole debt from which discharge was sought.

### IV.

That plaintiff herein at the first meeting of the creditors of said bankrupt on April 3d, 1915, first

learned that said bankrupt had transferred certain moneys to defendants. That before plaintiff had made any further investigation as to the facts of said transfer, and on May 20th, 1915, the said bankrupt applied to the aforesaid District Court for a discharge in bankruptcy. That upon the hearing of said application and the [48] objections of Edward McGinn thereto, said court on June 19th, 1915, referred the matter back to the Referee in bankruptcy for hearing upon the objections. That said hearing was had before Fred A. Copestake, Referee in Bankruptcy, in Stockton, California, on February 2d, 1916. That defendants above named were examined before the Referee at said hearing, and plaintiff first learned from the said examination the facts relative to the transfer of the said moneys as hereinbefore alleged.

## V.

That plaintiff as such Trustee in Bankruptcy has insufficient assets with which to pay in full the debts of said bankrupt, but on the contrary the assets of said Estate will be insufficient to pay any part whatever of the aforesaid claim as filed and allowed in said bankruptcy proceeding.

## VI.

That plaintiff has made demand upon defendants, and each of them, that they, and each of them pay over to him as such trustee the moneys transferred as aforesaid, and the said defendants, and each of them, refused and still refuse to pay over to him said moneys, or any part thereof.

And plaintiff prays that upon final hearing of this

cause that it be ordered and decreed that the moneys were transferred by said bankrupt to said defendants and received by them in fraud of the creditors of said bankrupt, and that the amount so transferred be determined and that defendants pay over the same to plaintiff as trustee as aforesaid, together with interest thereon and for such other general relief as may by the court be deemed just and equitable.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Solicitors for Plaintiff.

[Endorsed]: Filed Mar. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer Deputy Clerk. [49]

## UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

IN EQUITY.

SUBPOENA.

The President of the United States of America,  
GREETING: To E. T. Willey and Mrs.  
Charles F. Willey.

You are Hereby Commanded, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Second Division, aforesaid, at the Courtroom in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said court by John



C. Davis, Trustee of the Estate of Charles F. Willey in Bankruptcy, who is a citizen of the State of California, and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 14th day of March, in the year of our Lord one thousand nine hundred and seventeen, and of our Independence the 141st.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso*.

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [50]

State of California,

County of Tuolumne,—ss.

William Sweeney, being first duly sworn, deposes and says: That he is and was at the time of the service of the within subpoena, a citizen of the United States and the State of California, and a resi-

dent of the county of Tuolumne, over the age of twenty-one years, and not a party to the above-entitled action; that he served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the 29th day of March, 1917, in the county of Tuolumne, State of California.

WILLIAM SWEENEY.

Subscribed and sworn to before me this 31st day of March, 1917.

[Seal]

J. C. WEBSTER,  
Notary Public.

[Endorsed]: Filed Apr. 9, 1917. W. B. Maling Clerk. By J. A. Schaertzer, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY and Mrs. CHARLES F.  
WILLEY,

Defendants.

SEPARATE ANSWER OF E. T. WILLEY.

Comes now the defendant E. T. Willey above named, and answering plaintiff's complaint on file

herein, denies, alleges and admits as follows:

Admits Paragraph I of said complaint.

Answering defendant alleges that he has no knowledge, information or belief concerning the allegations contained in the first twenty-two lines of Paragraph II of said complaint, and basing his denial upon that ground denies the same.

Answering the rest of said Paragraph II of said complaint, said answering defendant denies that said bankrupt, after receiving the said moneys on the purchase price of the said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to answering defendant all, or any part, of the moneys received, as aforesaid, from the sale of said, or any, interest of Edward McGinn, together with other moneys of said bankrupt, amounting altogether to the sum of \$3300.00, or any other sum.

Denies that said, or any, transfer was made without consideration and with the intent and for the purpose of defrauding [51] said Edward McGinn out of the moneys due him, as aforesaid, or otherwise.

Denies that said transfer was made to said answering defendant with said intent and for said purpose with the full, or any, knowledge of said answering defendant, or with his consent, and in this connection answering defendant alleges that sometime in March, 1912, the exact date of which is now unknown to said answering defendant, said Charles F. Willey paid back certain moneys that he had previously borrowed from answering defendant, but

that none of the moneys so paid by said Charles F. Willey to said answering defendant were the moneys received by Charles F. Willey for said one-sixth interest in said, or any, mining claim, and that all of said moneys so paid by said Charles F. Willey to said answering defendant were lawfully paid in settlement of legal obligations owing from said Charles F. Willey to said answering defendant.

Answering Paragraph III of said complaint, said answering defendant avers that he has no knowledge, information or belief concerning the allegations contained therein, and therefore denies the same.

Answering Paragraph IV of said complaint, said answering defendant alleges that he has no information, knowledge or belief concerning the allegations therein contained, and therefore denies the same, except he admits that he was examined before the referee at said hearing.

Answering Paragraph V of said complaint, said answering defendant alleges that he has no information, knowledge or belief sufficient to answer the same and therefore denies the same.

Admits Paragraph VI.

And as a further, separate and distinct defense to said complaint, said answering defendant avers that the said [52] complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary it appears on the face thereof that said plaintiff has an adequate legal remedy against said answering defendant, if he has any remedy at all.

As a further, separate and distinct defense against said complaint, answering defendant alleges that more than six years have elapsed since the alleged fraudulent transfer set out in Paragraph IV of said complaint, and that all rights of the said plaintiff against said answering defendant on account thereof are barred by laches.

WHEREFORE, said answering defendant prays that he may be hence dismissed with his costs.

J. P. O'BRIEN,

Attorney for Answering Defendant, E. T. Willey.

Due service of the within admitted by copy this 15th day of May, 1917.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed May 15, 1917. Walter B. Maling, Clerk. [53]

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY and MRS. CHARLES F.  
WILLEY,

Defendants.

SEPARATE ANSWER OF MRS. CHARLES E.  
WILLEY.

Now comes Mrs. Charles F. Willey, and answering the complaint on file herein, denies, alleges and admits as follows:

Admits Paragraph I of said complaint.

Answering Paragraph II of said complaint, said answering defendant avers that she has no knowledge, information or belief sufficient to enable her to answer the allegations contained in the first twenty-two lines of said paragraph, and basing her denial upon that ground, denies the same.

Answering the rest of said Paragraph II, said answering defendant denies that said bankrupt, after receiving the aforesaid moneys on the purchase price of said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to answering defendant any of the moneys received, as aforesaid, from the sale of said interest of Edward McGinn, or any other moneys of said bankrupt, amounting altogether to the sum of \$3300.00, or any other sum, in excess of the sum of \$1500.00, and as to the transfer of said \$1500.00, said answering defendant alleges that said money, and the whole thereof, was transferred to her for a good and valuable consideration, [54] and was used by her in the support of her children.

Said answering defendant denies that said transfer was made without consideration and with the intent or for the purpose of defrauding said Edward McGinn out of the moneys due him, as aforesaid, or otherwise. Denies that said transfer was

made to said answering defendant with any intent or purpose of defrauding the said Edward McGinn out of the moneys due him, as aforesaid, and denies that said transfer was made, as aforesaid, with full or any knowledge of said answering defendant, or with the consent of said answering defendant, of defrauding said Edward McGinn out of the, or any, moneys due him, as aforesaid.

Answering Paragraph III of said complaint, said answering defendant avers that she has no knowledge, information or belief respecting the allegations therein contained, and basing her denial upon that ground, denies the same.

Answering Paragraph IV of said complaint, said answering defendant avers that she has no knowledge, information or belief of the allegations therein contained, and basing her denial upon that ground, denies the same, except that she admits that she was examined before the Referee at said hearing.

Answering Paragraph V of said complaint, said answering defendant avers that she has no knowledge, information or belief sufficient to enable her to answer said allegations, and basing her denial upon that ground denies the same.

Admits Paragraph VI of said complaint.

And as a further, separate and distinct defense to said complaint, said answering defendant avers that the said complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary, it appears on the fact thereof that said plaintiff has

an adequate legal remedy against said answering defendant, if [55] he has any remedy at all.

As a further, separate and distinct defense against said complaint, answering defendant alleges that more than six years have elapsed since the alleged fraudulent transfer set out in Paragraph IV of said complaint, and that all rights of the said plaintiff against said answering defendant on account thereof are barred by laches.

WHEREFORE, said answering defendant prays that she may be hence dismissed with her costs.

J. P. O'BRIEN,

Attorney for Answering Defendant, Mrs. Charles F. Willey.

Service of the within admitted by copy this 15th day of May, 1917.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed May 15, 1917. Walter B. Maling, Clerk. [56]

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At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the City and County of San Francisco, on Wednesday, the 16th day of January, in the year of our Lord one thousand nine hundred and eighteen. Present: The



Honorable JEREMIAH NETERER, District Judge for the Western District of Washington, designated to hold and holding this Court.

No. 341—EQUITY.

JOHN C. DAVIS, Trustee, etc.,

vs.

E. T. WILLEY and Mrs. CHARLES F. WILLEY.

MINUTES OF COURT—JANUARY 16, 1918—  
ORDER DISMISSING SUIT AND FOR  
ENTRY OF DECREE.

After argument by counsel the suit was submitted and being fully considered it was ordered that the defendant Mrs. Charles F. Willey pay to the plaintiff the sum of \$1565.00 within 45 days, that this suit be and the same is hereby dismissed as to the defendant E. T. Willey, and that a decree be signed, filed and entered herein, accordingly.  
[57]

(Title of Court and Cause.)

#### ENROLLMENT.

The plaintiff filed his bill of complaint herein on the 14th day of March, 1917, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, which is hereto annexed.

On the 15th day of May, 1917, the answer of E. T. Willey, was filed herein, which is hereto annexed.

On the 15th day of May, 1917, the Answer of Mrs. Charles F. Willey was filed herein, which is hereto annexed.

On the 16th day of January, 1918, an Order directing decree to be signed, filed and entered herein, was made and entered herein, a copy of which said order is hereto annexed.

Thereafter a Decree was signed, filed and entered herein in the words and figures as follows, viz.: [58]

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY and Mrs. CHARLES F.  
WILLEY,  
Defendants.

DECREE.

At the November term of the District Court of the United States for the Northern District of California, held in the United States Courtroom at San Francisco, California, on the 7th day of November, in the year of our Lord one thousand nine hundred and seventeen, Present, Hon. JEREMIAH NETERER, District Judge.

This cause came on to be heard at the November

Term of the said court in the year of our Lord one thousand nine hundred and seventeen, and was called for trial on January 15, 1918, and partly tried on that date, and the trial continued over to the following day on which day the trial was completed, and on the conclusion of the trial the Court found that on June 26, 1914, Charles F. Willey was, by the above-entitled court, duly adjudicated a bankrupt; and that on April 3, 1915, plaintiff was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter qualified as such trustee, and ever since has been and now is the duly appointed, qualified and acting trustee in bankruptcy of the estate of said bankrupt, and the Court orally gave its decision as follows:

“I am thoroughly convinced that this matter never should have found its way into the bankruptcy court. I do not [59] believe that Mr. Willey was a bankrupt at the time that this petition was filed. I think I should say that at the time the petition in bankruptcy was filed he had different counsel than he has now.

“I think that we confuse in our discussion in this case the trust fund. This entire fund in issue is a trust fund placed in this court by the bankrupt himself, that is, such part of the fund, if any, that is part of this estate. I understand there is only one creditor. The trust fund contended for on behalf of the creditor is a fund which was derived from the sale of a certain mining claim, and I believe amounted to some \$1,490. Now, the creditor’s

right to pursue that fund and the trustee's right to pursue a fund placed in this court by bankruptcy proceedings do not bear the same relation. The trustee has a right to pursue the fund of the bankrupt estate wherever it may be found and have it adjudicated in a bankruptcy court unless perchance the rights of some other person might intervene, which will require the deliberation upon that issue by a jury. I think in this case the rights of the defendants E. T. Willey and Mrs. Willey are not the same. E. T. Willey received from the funds of Mr. Willey about eight months prior to the time of his filing his petition in bankruptcy, if I remember right, \$1,787. This was received by him, as testified to by him, by Mrs. Willey and by the bankrupt Mr. Willey in payment of advances made by him prior to that time to the bankrupt Willey. So that the payment of this creditor, if he was a creditor, made prior to the four months' period preceding adjudication, would not under the bankruptcy act be a fraudulent preference. It would be a payment which the bankrupt had a right to make.

“That indebtedness is a matter which could not be determined [60] in the original bankruptcy proceeding. It would have to be determined in a plenary action where Willey would have a right to have that issue passed upon by a jury. Under the testimony disclosed in this case it is established beyond any question that the defendant, E. T. Willey, has none of this

money; that while he received \$1,787 he paid for an automobile something over \$700, which was used by the bankrupt Willey and levied upon by the sheriff to satisfy a judgment which was secured by the creditor; and the remainder of the fund he paid to Mrs. Willey, and Mrs. Willey stated that she received it. Now, as to the amount paid to Mr. Willey and subsequently paid by him to Mrs. Willey I do not think this court is going to be concerned about. I do not know that I should comment upon the evidence.

“I find from an examination of the pleadings in this case that the total amount of the indebtedness of this estate is something over \$1,000 reduced to judgment by the only creditor of this estate. The credit claim shows that 400 odd dollars has been paid on this judgment. From some suggestion made on examination of one of the witnesses this may not be a proper credit. I do not know whether it is, or not; that is not before the Court; so that it would be unnecessary for the court to determine with relation to the indebtedness due to E. T. Willey even though that was properly before the Court.

Mrs. Willey said she received \$1,500 in addition to the other sums that E. T. Willey paid to her. I think the \$1,500 should be returned and paid to the trustee. Mr. Willey testified that some of the money was used in improving the homestead. It is not necessary for the Court to determine that matter now; that is really not

before the Court. I am going to make an order [61] that Mrs. Willey pay to the trustee the \$1,565 which she received, \$1,500 of this money and \$65 interest which was received from the bank. I think that she could pay that within 30 or 45 days. If she fails to do that then it will be incumbent upon the court to determine whether she has the money and can pay it upon an order to show cause why she should not be committed for contempt of court.

I think I should say now that I cannot see why these parties should not get together and dispose of this matter in the right way and amicably, and not require the court to dispose of it. This can be done a great deal better by the parties than it can be by the Court; and if the parties had done this before the bankruptcy proceeding was instituted it would have been a great deal better. I simply make that observation because I feel that I should do it.”

It is therefore ordered, adjudged and decreed that the said defendant Mrs. Charles F. Willey within forty days from date hereof pay over to the said plaintiff John F. Davis, trustee of the estate of Charles F. Willey in Bankruptcy, the said sum of one thousand five hundred and sixty-five (\$1565) dollars.

Dated: February 7th, 1918.

JEREMIAH NETERER,

District Judge.

[Endorsed]: Filed and entered February 11, 1918. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

**CERTIFICATE TO ENROLLMENT.**

WHEREUPON, said pleadings, subpoena, copy of order and decree, are hereto annexed; said final decree being duly signed, filed and enrolled, pursuant to the practice of said District Court.

Attest my hand and the seal of said District Court this 11th day of February, 1918.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed February 11th, 1918. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Petition for Writ of Error.**

John C. Davis, trustee of the estate of Charles F. Willey, in bankruptcy, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the court and the judgment entered

herein on the 20th day of February, 1920, comes now by Messrs. J. C. Webster and William H. Bryan, his attorneys, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 2nd, 1920.

J. C. WEBSTER,  
WILLIAM H. BRYAN,  
Attorneys for said Plaintiff.

[Endorsed]: Filed Aug. 2, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.



### **Assignment of Errors.**

Comes now John C. Davis, trustee of the estate of Charles F. Willey, in Bankruptcy, plaintiff above named, and makes and files the following assignment of errors upon which he will rely upon the prosecution of his writ of error in the above-entitled cause;

1. The District Court above named for the Northern District of California, Second Division, erred in making its Conclusions of Law and entered judgment in favor of defendant and against plaintiff on the facts as found by the court;

2. The decision was contrary to and against law, because the court erred in making, giving, rendering and entering judgment in favor of defendant, and erred in failing to give, make, render and enter judgment in favor of plaintiff;

3. The Court erred in making its Conclusion of Law that the action was barred by the order or decree dismissing as to defendant, E. T. Willey, the suit of John C. Davis, Trustee, etc., vs. E. T. Willey and Mrs. Charles F. Willey, Number 341, in Equity, in the above-entitled court, and rendering and entering judgment for defendant thereon; because it appears from the undisputed evidence that the said order or decree dismissing E. T. Willey in action Number 341 does not constitute a bar to the present action. [65]

4. The Court erred in finding as a fact in Finding V that the disclosure at the trial of Willey vs. Sweeney, of a transfer on the bank records from

Charles F. Willey to E. T. Willey was such as to put Edward McGinn and this plaintiff, John C. Davis, upon inquiry as to the fraud as to said transfer and to show that an investigation would have exposed the entire transaction set forth in this action; and the Court erred in making its Conclusion of Law thereon that the action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon, because it appears from the undisputed evidence that the proceedings and the testimony given at the trial of said case of Willey vs. Sweeney were insufficient to give such notice to this plaintiff as to put him upon inquiry as to the fraud set forth in this action, and to require him to make investigation therefor;

5. The Court erred in making its Conclusion of Law that the action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon, because this action being an action by a trustee in bankruptcy, to recover property conveyed by the bankrupt in fraud of his creditors is not governed by the Statute of Limitations prescribed by the State of California, but by the Statute of Limitations prescribed by the Bankruptcy Act.

WHEREFORE, the said John C. Davis, Trustee, as aforesaid, plaintiff in error herein, prays that the judgment of the above-entitled court be reversed, and a new trial granted.

Dated, San Francisco, California, August 2d,  
1920.

J. C. WEBSTER,  
WILLIAM H. BRYAN,  
Attorneys for Plaintiff in Error. [66]

[Endorsed]: Filed Aug. 2, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

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In the Southern Division of the United States Dis-  
trict Court, in and for the Northern District  
of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Order Allowing Writ of Error.**

Upon motion of J. C. Webster and William H. Bryan, attorneys for the plaintiff, John C. Davis, Trustee of the estate of Charles F. Willey, in bankruptcy, and upon filing a petition for a writ of error and an assignment of errors,

IT IS ORDERED, that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is hereby fixed at Three Hundred

(\$300.00) Dollars *Dollars*; said bond to serve as a bond on said writ of error.

Dated August 5th, 1920.

WM. C. VAN FLEET,  
Judge of said Court.

[Endorsed]: Filed Aug. 5, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

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(NATIONAL SURETY COMPANY.)

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, John C. Davis, Trustee of the Estate of Charles F. Willey, in bankruptcy, as Principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as Surety, are held and firmly bound unto E. T. Willey, said Defendant in Error, in the above-entitled cause, in the sum of three hundred dollars (\$300), to be paid said defendant in error, to which payment well and

truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of August, 1920.

WHEREAS, the above-named plaintiff in error seeks to prosecute his Writ of Error to the United States Circuit Court of Appeals for the Ninth District to review and reverse the judgment entered in the above-entitled action by the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said Writ of Error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

JOHN C. DAVIS,  
NATIONAL SURETY COMPANY,  
By FRANK H. POWERS,  
Resident Vice-President.

[Corporate Seal]

Attest:

F. J. CRISP.

Resident Asst. Secretary. [69]

State of California,

City and County of San Francisco,—ss.

On this 19th day of Aug. in the year one thousand nine hundred and twenty before me, John McCallan, a Notary Public in and for the said City and County

of San Francisco, residing therein, duly commissioned and sworn, personally appeared Frank H. Powers and F. J. Crisp known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of the National Surety Company, the Corporation described in, and that executed the within instrument, and also know to me to be the persons who executed it on behalf of the Corporation therein named, and they acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Approved this 20th of August, 1920.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Aug. 20, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern Dis-  
trict of California, Southern Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Affidavit of William H. Bryan.**

State of California,  
City and County of San Francisco,—ss.

William H. Bryan, being first duly sworn on oath, says: That he is now, and at all times herein mentioned was, a citizen of the United States, over the age of 21 years, and not a party to the above-entitled action; that on the 20th day of August, 1920, he served the Writ of Error and Citation on Writ of Error issued in the above-entitled action on August 20, 1920, upon William E. Billings, attorney for defendant, by leaving a true copy of each of the same at his office in the Hearst Building, City and County of San Francisco, State of California, with a person in charge thereof, between the hours of ten o'clock A. M. and 4 o'clock P. M. of said day.

WILLIAM H. BRYAN.

Subscribed and sworn to before me this 24th day of August, 1920.

[Seal] CHARLES R. HALTON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Aug. 30, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Clerk's Office.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Praeceptum for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please prepare record on writ of error in the above-entitled cause and include therein the following papers:

Amended complaint;

Amendment to amended complaint;

Answer;

Amendment to Answer;

Opinion of the Court;

Stipulation for Findings;

Findings of Fact and Conclusions of Law;

Judgment entered February 20, 1920;

Certificate to Judgment-roll;

Notice of Decision;

Engrossed Bill of Exceptions, with order settling, certifying and allowing the same;

Assignment of Errors;

Petition for Writ of Error;

Order Allowing Writ of Error;



Bond on Writ of Error;

Writ of Error;

Citation on Writ of Error;

Affidavit of Service of Writ of Error and Citation on Writ of Error.

Defendant's Exhibit "A" (part of Bill of Exceptions—Judgment-roll in *Davis v. Willey*, No. 341 In Equity);

This Praecipe.

Dated August 27, 1920.

J. C. WEBSTER,

WILLIAM H. BRYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 30, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court

of the United States, for the Northern District of California, do hereby certify the foregoing seventy-two (72) pages, numbered from 1 to 72, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$27.70; that said amount was paid William H. Bryan, attorney for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of October, A. D. 1920.

[Seal] WALTER B. MALING,  
Clerk United States District Court, for the Northern District of California. [73]

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In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States to the Honorable the Judges of the District Court of the United States, Northern District of California,  
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between John C. Davis, Trustee, of the estate of Charles F. Willey, in bankruptcy, plaintiff and plaintiff in error, and E. T. Willey, defendant and defendant in error, a manifest error hath happened to the great damage of the said John C. Davis, trustee aforesaid, plaintiff in error, as by said complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the said parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, on the 19th day of September, 1920, in the Circuit Court of Appeals, to be then and there held, that [74] the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,



the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal]    WALTER B. MALING,  
Clerk United States District Court Northern Dis-  
trict of California.    [76]

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In the Southern Division of the United States Dis-  
trict Court, in and for the Northern District of  
California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Citation on Writ of Error.**

The President of the United States of America, to  
E. T. Willey, and to William E. Billings, His  
Attorney, GREETING:

You and each of you are hereby cited and admon-  
ished to be and appear in the Circuit Court of Ap-  
peals for the Ninth Circuit, in the City and County  
of San Francisco, State of California, within thirty  
days from and after the date this citation bears,  
pursuant to a writ of error filed in the office of the  
clerk of the United States District Court for the  
Northern District of California, Second Division,  
in the above-entitled cause, wherein John C. Davis,  
trustee of the estate of Charles F. Willey, in bank-

ruptcy, is plaintiff, and E. F. Willey is defendant, to show cause, if any there be, why the judgment made and rendered in the above-entitled cause on the 20th day of February, 1920, against said John C. Davis, as such trustee, as plaintiff in said writ of error mentioned, should not be corrected and reversed, and why said justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 20th day of August, 1920.

WM. C. VAN FLEET,  
United States District Judge for the Northern District of California. [77]

[Endorsed]: No. 16,147. Southern Division of the United States District Court. in and for the Northern District of California, Second Division. John C. Davis, Trustee, etc., Plaintiff, vs. E. T. Willey, Defendant. Citation on Writ of Error. Filed Aug. 21, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. John C. Davis, as Trustee of the Estate of Charles F. Willey, in Bankruptcy, Plaintiff in Error, vs. E. T. Willey, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of

the United States District Court of the Northern District of California, Second Division.

Filed October 6, 1920.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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United States Circuit Court of Appeals for the  
Ninth Circuit.

JOHN C. DAVIS, Tr., etc.,  
Plaintiff in Error,  
vs.

E. T. WILLEY,  
Defendant in Error.

**Order Extending Time to and Including October 18,  
1920, to File Record and Docket Cause.**

Good cause being shown, it is hereby ordered that the plaintiff in error may have to and including October 18, 1920, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 18, 1920.

WM. W. MORROW,  
U. S. Circuit Judge.

[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of, Rule 16 Enlarging Time to and Including Oct 18, 1920, to File Record and Docket Cause. Filed Sep. 18, 1920. F. D. Monckton, Clerk. Refiled Oct. 6, 1920. F. D. Monckton, Clerk.



In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of  
CHARLES F. WILLEY, in Bankruptcy,  
Plaintiff,

vs.

E. T. WILLEY,

Defendant.

**Certificate of Clerk U. S. District Court Re Date of  
Filing of Complaint and Issuance of Summons.**

United States of America,  
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, hereby certify that the complaint in the above-entitled action was filed on the 26th day of March, 1918, in the above-entitled court and summons was issued thereon on the same day.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of January, A. D. 1921.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern District of California.

[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. John C. Davis, Trustee, etc., vs. E. T. Willey. Certificate of Clerk U. S. District Court Re Date of Filing of Complaint and Issuance of Summons. Filed Jan. 6, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.